83-656

Office Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

**IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1983**

No. _____

CARIBE TUGBOAT CORPORATION
AND CROWLEY TOWING
and TRANSPORTATION COMPANY,

Petitioners,

vs.

DANIEL T. DUFFY,

Respondent.

---

*Petition for Writ of Certiorari to the
Supreme Court of Florida*

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and

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QUESTION FOR REVIEW

Whether a state forum in adjudicating a maritime and Jones Act claim must adhere to explicit law established by the Supreme Court of the United States.

LIST OF PARTIES

The parties, with reference to their status at the Trial court are:

1. Petitioners - Caribe Tugboat Corporation and Crowley Towing and Transportation Company, Defendants.

2. Respondent - Daniel T. Duffy, Plaintiff.

TABLE OF CONTENTS

Page

QUESTION FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

REFERENCE TO OFFICIAL REPORTER 1

GROUNDS ON WHICH JURISDICTION IS INVOKED 2

CONSTITUTIONAL PROVISIONS, STATUTES OR CASES INVOLVED 3

STATEMENT OF CASE

I. Facts Material to Consideration of Questions Presented. 4

II. Facts upon which a Federal Question arises. 5

ARGUMENT 6

Argument for Granting Writ:

The Federal Question Raised is substantial: A State forum in adjudicating a maritime and Jones Act claim must adhere to explicit law established by the Supreme Court of the United States.

CONCLUSION 12

CERTIFICATE OF SERVICE 13

APPENDIX CONTENTS

APPENDIX "A" ..... A 1-3

Judgment in the Trial Court

APPENDIX "B" ..... A 4-9

Motion for New Trial

APPENDIX "C" ..... A 10-11

Court's Order denying the Motion for New Trial in the Trial Court

APPENDIX "D" ..... A 12

Transcript page 642

APPENDIX "E" ..... A 13-14

Opinion of the Court of Appeal

APPENDIX "F" ..... A 15

Denial of the Petition for Rehearing in the Court of Appeal

APPENDIX "G" ..... A 16-17

Order from the Supreme Court, (July 26, 1983)

APPENDIX "H" ..... A 18

Table of Contents from Initial Brief of Appellant filed on August 30, 1982 with District Court of Appeal.

TABLE OF AUTHORITIES
CASES

Page

Cazad v. Chesapeake & Ohio Railway Co.,
622 F.2d 72 (4th Cir. 1980) 7, 9

Chelentis v. Luckenbach S.S. Co.,
247 U.S. 372, 38 S.Ct. 501 (1918) 8

Fitzgerald v. United States Lines Co.,
374 U.S. 16, 20, 10 L.Ed.2d 720,
83 S.Ct. 1646 (1963) 8

Garrett v. Moore - McCormack Co.,
317 U.S. 239, 87 L.Ed. 239, 63 S.Ct. 246 (1942) 2

Gianfala v. Texas Co.,
350 U.S. 879, 100 L.Ed.
775, 76 S.Ct. 141 (1955) 10, 11

Grimes v. Raymond Concrete Pile Co.,
355 U.S. 867, 78 S.Ct. 123 (1957), (*cert. granted*),
356 U.S. 252, 2 L.Ed.2d 737, 78 S.Ct. 687 (1958) 10

Jones & Laughlin Steel Corp., v. Pfeifer,
__U.S.__, 76 L.Ed.2d 768, 103 S.Ct.__
(June 1983) 7, 9

Lang v. Texas & Pacific Railway Co.,
624 F.2d 1275 (5th Cir. 1980) 7

Moragne v. States Marine Lines, Inc.
398 U.S. 375, 26 L.Ed.2d 339, 90 S.Ct.
1772 (1970) 8

Norfolk & Western Railway Co. v. Liepelt,
444 U.S. 490, 62 L.Ed.2d 689, 100 S.Ct. 755, *reh. den.*,445 U.S. 972, 64 L.Ed.2d 250, 100 S.Ct. 1667 (1980) . . . 3, 4, 6

O'Byrne v. St. Louis Southwestern Railway Co.,
632 F.2d 1285 (5th Cir., Unit A, 1980) 7

Panama Railroad Co. v. Johnson,
264 U.S. 375, 68 L.Ed. 748, 44 S.Ct. 391 (1924) 7

Sea-Land Services v. Gaudet,
414 U.S. 573, 39 L.Ed.2d 9, 94 S.Ct. 806 (1974) 7

Senko v. Lacrosse Dredging Corp.,
352 U.S. 370, 1 L.Ed.2d 404, 77 S.Ct. 415, *reh. den.*, 353 U.S. 931, 1 L.Ed.2d 724, 77 S.Ct. 716 (1957) 2, 10

Southern Pacific Co., v. Jensen,
244 U.S. 205, 217, 61 L.Ed. 1086, 37 S.Ct. 524, 529 (1917) 8

The Lottawanna,
88 U.S. (21 Wall.) 558, 22 L.Ed. 654 (1874) 8

United States v. Reliable Transfer Co.,
421 U.S. 397, 44 L.Ed.2d 251, 95 S.Ct. 1708 (1975) 8

CONSTITUTIONAL PROVISIONS AND STATUTES

1. U.S. Constitution Article III 3

2. The Jones Act, 46 U.S.C. §688 ..... 3, 4, 7

3. Federal Employees' Liability Act, 45 U.S.C. §§51, et seq. 7

REFERENCE TO OFFICIAL REPORTER

The Citation of the Supreme Court of Florida Case is not, as of the filing of this Petition, available.

The Citation of the First District Court of Appeal is 427 So.2d 227 (Fla. 1st D.C.A. 1983)

The Order and Judgment of the Trial Court, the Circuit Court of the Fourth Judicial Circuit in and for Duval County, Florida is not reported.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The basis of jurisdiction is that a state Court system has decided a federal question in a way to conflict with applicable decisions of this Honorable Court. (Rule 17.1 (c))

The order of the Florida Supreme Court is dated July 26, 1983. (Appendix "A", A 1). The opinion of the intermediate Court is attached (Appendix "E", A 10). The federal question was raised at all levels of Florida Courts. The federal question was that the state forum had disregarded the substantial federal rights of the defendants and the maritime law of damages as pronounced by this Honorable Court.

The statutory authority and supporting citations for such jurisdiction are 28 U.S.C. §1257 and Rule 17.1 (c). The bases for such matter being a federal question are substantial and include, among others:

a) *Garrett v. Moore - McCormack Co.*
317 U.S. 239, 87 L.Ed. 239, 63 S.Ct. 246 (1942)

b) *Senko v. Lacrosse Dredging Corp.*
352 U.S. 370, 1 L.Ed.2d. 404, 77 S.Ct. 415, *reh. den.*, 353 U.S. 931, 1 L.Ed.2d 724, 77 S.Ct. 716 (1957)

The bases upon which jurisdiction is invoked are the Code, Rule, and case citations relied on above. In *Garrett, supra,* the Court states succinctly:

> "So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. Whether it did so raises a federal question reviewable here under §237 (b) of the Judicial Code, 28 USCA §344(b)."

CONSTITUTIONAL PROVISIONS, STATUTES OR CASES INVOLVED

1. United States Constitution, Art. III, §2

2. Section 33 of the Merchant Marine Act of June 5, 1920, commonly referred to as *Jones Act*, 46 U.S.C.A. §688:

RECOVERY FOR INJURY TO OR DEATH OF SEAMAN

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

3. *Norfolk and Western Railway Co. v. Liepelt*, 44 U.S. 490 (1980)

DECISION: State Court's refusal to instruct jury as to non taxability of award is unlawful.

STATEMENT OF THE CASE

I. Facts Material to Consideration of Questions Presented

This action arose from a personal injury sustained by Daniel T. Duffy, a seaman employed by Defendants. Complaint was filed in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida. The Complaint alleged claims under the *Jones Act*, 46 U.S.C.A. §688, *et seq.* and the Maritime Law of the United States.

During the trial and at the settling of the jury instructions, Petitioners - Defendants submitted an instruction as follows:

> "The Court instructs the Jury that in the event you should award compensatory damages to Mr. Duffy in this case, that any award will not be subject to the Federal Income tax and that the Jury should not, therefore, add or subtract taxes in fixing the amount of any award"

The Trial Court although apprised of the decision of *Norfolk and Western Railway Company, v. Liepelt*, 444 U.S. 490 (1980) declined to so instruct and said instruction was denied (transcript page 642; Appendix "D", A 12). The jury returned a verdict in an amount of Four Hundred Thousand Dollars. Judgment was entered thereon. Post Trial relief sought by Petitioner (Appendix "B", A 4-9) brought no relief and Post Trial Motions were denied (Appendix "C", A 10-11). The cause proceeded on appeal from the Circuit Court of the Fourth Judicial Circuit, in and for Duval County Florida, to the District Court of Appeal for the First District, State of Florida, Docket No. AL-489. The Federal question presented at the Trial Court was renewed and presented to the Court of Appeal as to whether the Trial Court had committed error in failing to give the requested *Liepelt* instruction, "a matter of Federal

law." (Appendix "H", A 18). The Court of Appeal held the matter to be error but "harmless." Said opinion is setforth herein (Appendix "E", A 13-14).

Petitioner then sought relief to the Florida Supreme Court upon the issue concerning the determination of a significant aspect of Maritime law, since Courts of Florida were misapplying the maritime law as set forth by the Supreme Court of the United States. In a five-to-two decision the Supreme Court of Florida declined to further hear the case, (Appendix "G", A 16-17). This Petition followed.

II. Facts Upon Which A Federal Question Arises.

This matter is a *Jones Act* and Maritime law case. The Federal question under such law arose when the *Liepelt* instruction was first submitted to the Court and thereafter denied.

The Federal question continued to dominate on the trial level by the Post Trial Motions and decision on Post Trial Motions.

The substantial federal question was submitted to the District Court of Appeal and the Florida Supreme Court directly bringing the issue that Florida forums, both trial and appellate, disregarded the pointed substantial federal question and the fact the failure to give the *Liepelt* instruction was in direct contradiction to the pronouncement of the United States Supreme Court in the *Liepelt* case.

ARGUMENT FOR GRANTING WRIT

THE FEDERAL QUESTION RAISED IS SUBSTANTIAL:

A STATE FORUM ADJUDICATING A MARITIME AND JONES ACT CLAIM MUST ADHERE TO EXPLICIT LAW ESTABLISHED BY THE SUPREME COURT OF THE UNITED STATES.

This Court is petitioned as final recourse to obtain relief from the Florida Courts' manifest disregard of the law as promulgated by this Court — a disregard which threatens the uniformity of maritime law. Recourse here only obtains, because the Florida Supreme Court failed to recognize the importance of the issue and its amenability to summary determination.

The small amount of time necessary to dispose of this issue compared to the enormous harm threatened to the uniformity of the administration of maritime law makes this case a compelling one for certiorari. Failure to accept certiorari will encourage the state courts to fashion their own maritime remedies and will condone blatant "forum shopping."

The disregard of maritime law was so great, the lack of uniformity so grievous and the violation of the fair stream of damages so complete, that granting of this Petition is in order.

In *Norfolk and Western Railroad Co. v. Liepelt*, 444 U.S. 490, 62 L.Ed.2d 689, 100 S.Ct. 755 (1980), this Court held that the jury must be instructed that the award is not subject to income taxation. The reason was apparent and the execution of such law simple. *Liepelt* applies to all maritime personal injury

cases. [1] *Cf. Jones & Laughlin Steel Corp. v. Pfeifer*, __U.S.__, 76 L.Ed.2d 768, 103 S.Ct. __, (1983).

A trial court's failure to charge *Liepelt* to the jury is by no means "harmless." *See Cazad v. Chesapeake & Ohio R.R. Co.*, 622 F.2d 72 (4th Cir. 1980); *O'Byrne v. St. Louis Southwestern Railway Co.*, 632 F.2d 1285 (5th Cir., Unit A, 1980); *Lang v. Texas & Pacific Railway Co.*, 624 F.2d 1275 (5th Cir. 1980). Nonetheless, it has been so characterized by the Appellate Courts of Florida.

At the trial on the case at bar, Petitioner submitted the following Request for Instruction to the judge:

> "The Court instructs the jury that in the event you should award compensatory damages to Mr. Duffy in this case, that any award will not be subject to the Federal income tax and that the jury should not, therefor, add or substract taxes in fixing the amount of any award."

The trial court refused to submit the requested charge, to the jury. (Appendix "D", A 12). The jury returned a verdict of $400,000 in favor of plaintiff who had sustained a fractured ankle, whose medical expenses were paid, whose temporary wage loss was minimal, who was working at the time of the trial, and whose earnings, at the time of trial, exceeded his pre-accident wages. Post-trial motions for new trial and remittitur were denied.

Admitting the trial court's failure to charge *Liepelt* was error, the intermediate Appellate Court held it to be "harmless" and affirmed. By a 5-2 vote the Florida Supreme Court denied a petition for writ of certiorari.

The *Liepelt* decision was a balancing of fairness. It was a statement by the United States Supreme Court that

[1] The *Federal Employees' Liability Act*, 45 U.S.C. §§51, *et seq.* is incorporated into the Jones Act, 46 U.S.C.A. §688; *Panama Railroad Company v. Johnson*, 264 U.S. 375, 68 L.Ed. 748, 44 S.Ct. 391 (1924); *Sea-Land Services v. Gaudet*, 414 U.S. 573, 39 L.Ed.2d 9, 94 S.Ct. 806 (1974).

employees such as the Plaintiff herein, who come within Federal protection of various employee acts have rights, *but* correspondingly all parties to the litigation have rights. This court recognized that such a pronouncement would take little time to do, would avoid any confusion, and would be fair.

We respectively submit that the Court below in the instant case disregarded this concept and allowed the case to go to the jury without this critical and well recognized instruction.

The Courts below, in denying the requested instruction, in denying the Motion for a New Trial, and in denying relief in the appellate process, disregarded the clear charted requirements of the law. The lower Court, in abandoning the clear reasoning and holding of *Liepelt, supra,* disregarded the law of the land.

It is mandatory for the Courts below to give this fair instruction that is not prejudicial to either side, since it is merely a clear statement of the law. We encourage this Court, and submit to this Court that the cause as to damages should be remanded for a new Trial with fair instructions. The *Liepelt* instruction, requested but not given herein, is a fair instruction.

This Court has been quick to intervene and correct the application of state law where there is a clear, established rule in maritime law. *Cheientis v. Luckenbach S.S. Co.,* 247 U.S. 372, 38 S.Ct. 501 (1918). [2] The Court should do so here. [3] The

[2] As old as the history of this Republic is the maxim that the admiralty and maritime law must be uniform and not the province of the several states. *The Lottawanna,* 88 U.S. (21 Wall.) 558, 22 L.Ed. 654 (1874). The danger to a disjointed maritime law has been often recognized: "(F)reedom of navigation between the states and with foreign countries would be seriously hampered and impeded." *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 217, 61 L.Ed. 1086, 37 S.Ct. 524, 529 (1917).

[3] The Court has led in formulating fair and uniform remedies in the law maritime. *Fitzgerald v. United States Lines Co.,* 374 U.S. 16, 20, 10 L.Ed.2d 720, 83 S.Ct. 1646 (1963) and *United States v. Reliable Transfer Co.,* 421 U.S. 397, 44 L.Ed.2d 251, 95 S.Ct. 1708 (1975). Nowhere is the formulating of fair and uniform concepts in the law maritime more prevalent than damages in personal injury cases. In *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375, 26 L.Ed.2d 339, 90 S.Ct. 1772 (1970), this Court recognized a right to recover for wrongful death that sought "uniform vindication of federal policies" that would remove discrepancies arising from accommodation of state applications.

Florida Court has attempted to circumvent the law of this Court by characterizing the admitted error as "harmless." To countenance the state's actions in this case only encourages further intrusions into this Court's application of maritime law. Some examples of possible further intrusions into the uniformity of the administration of maritime law include disregard of other mandated charges to the jury; variances of the rules of the standard of care under the *Jones Act*; destruction of the neatly balanced rules for determining whether a jury trial is required.

Uniformity was not so much as given any regard. The Florida treatment of the *Liepelt* Rule is even more unfair and more irregular when one considers it is applied in Federal forums in the same geographic region. Federal Courts confronted with the same circumstances as the instant case apply the *Liepelt* Rule. Cases have been reversed on damages and remanded to the Trial court by Courts of Appeal. *Cazad, O'Byrne,* and *Lang, supra.* Thus there is no uniformity, absolutely. There is only a disregard of the *Liepelt* Rule of this Court, and the dire consequences to this Court's concept of fairness.

The disregard of *Liepelt* is even more glaring in light of *Jones & Laughlin Steel Corp., v. Pfeifer,* __U.S.__, 76 L.Ed.2d 768, 103 S.Ct. __ (June 1983). This Court overturned the Third Circuit's application to a longshoreman's case of the Rule of the Pennsylvania Supreme Court that in measuring damages, the discount on future earnings should be deemed totally offset by inflation. The "relevant stream of damages" was contemplated by this Court. This Court contemplated that the award was tax free. *Id.* at 76 L.Ed.2d at 781. The Court also contemplated from the *Liepelt* Rule that the jury would not know that the award was tax free.

Failure to correct the Florida Court's ruling in this case encourages the most blatant attempts at "forum shopping." If the state court does not charge *Liepelt* and the federal court does, plaintiffs will "flock" to the state forum. But other,

future deviations by Florida Courts from this Court's interpretation of the maritime law could equally reverse the flow back to federal courts. For example, a state court's denial of a jury trial in a maritime case where a federal court provides for a jury trial on the same case would send plaintiffs scurrying to the federal courts.

To say that the Appellate Court's acknowledgement of error will thwart future abuses ignores what happened here. If a trial judge wants to "lean" towards a maximum recovery for plaintiff, the judge need do no more than refuse to charge *Liepelt* with the assurance that the error will be held "harmless" by the Appellate Courts.

This Court should treat this matter as it has in past, similar matters.

This Court need not spend a great deal of time disposing of this case. Petitioner seeks a "summary disposition on the merits" under Rule 23.3 of the United States Supreme Court Rules, as this court has previously done in maritime cases, where lower courts have failed to follow this Court's ruling on seamen's status.

There was a time when a recurring issue arose in *Jones Act* cases to wit: whether what constituted seaman status was a jury issue. Such issues were repeatedly raised, *e.g. Senko v. Lacrosse Dredging Corp.*, 352 U.S. 370, 1 L.Ed.2d 404, 77 S.Ct. 415, *reh. den.*, 353 U.S. 931, 1 L.Ed.2d 724, 77 S.Ct. 716 (1957) on procedural aspects quite similar to this instant case.

Similarly, in *Grimes v. Raymond Concrete Pile Co.*, 355 U.S. 867, 78 S.Ct. 123 (1957), when the District Court directed a verdict in favor of defendant on plaintiff's seaman status, this Court granted the petition for a writ of certiorari and the "case (was) transferred to summary calendar." *Id.* In a later per curiam opinion, this Court reversed the Court of Appeals' holding, since the District Court should have sent the case to the jury. *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252, 78 S.Ct. 687 (1958).

We submit that *Gianfala v. Texas Co.*, 350 U.S. 879, 100

L.Ed. 775, 76 S.Ct. 141 (1955), is also in point. This Court granted the Petition for writ of certiorari and reversed the judgement all at one time, without argument, in a memorandum case. Such is needed here.

The enforcement of lucid pronouncements of this Court is the issue. Did the Supreme Court of the United States direct lower courts to give the *Liepelt* jury instructions or not? Of course it did. The Petitioner has been raising the point of the fairness and uniformity of this Rule from the beginning. No forum has cured this wrong. No forum was concerned about the fairness of the Rule or this Court's mandate. We urgently request this Court to enforce its Rule of Law.

CONCLUSION

Return this cause to the state forum. The decision should be summarily reversed. There should be acceptance of this Petition for Writ of Certiorari *without argument* with remand on the basis that fairness, uniformity and the martime rule making of this Court demand that basic damage instructions must be given by *trial courts*. Such enforcement of the decisions of this Honorable Court is necessary to keep the stream of damages in maritime cases in concert with the laws of the United States and pronouncements of this Court.

WILLIAM R. P. HOGAN
JOHN J. WALSH
FREEHILL, HOGAN
& MAHAR

and

TOOLE, TAYLOR, MOSELEY
& JOYNER

By James F. Moseley
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501 West Bay Street
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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Mr. Robert L. Cowles, Cowles, Coker, Myers, Schickel & Pierce, P.A., at Post Office Box 1860, Jacksonville, Florida 32201 by United States Mail this 19th day of October, 1983.

James F. Moseley

JAMES F. MOSELEY
Toole, Taylor, Moseley
& Joyner
501 West Bay Street
Jacksonville, Florida 32202

Attorneys for Petitioners,

Caribe Tugboat Corporation and
Crowley Towing and
Transportation Company,

IN THE CIRCUIT COURT, OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 80-5794-CA

DIVISION: "I"

DANIEL T. DUFFY,

Plaintiff,

vs.

CARIBE TUGBOAT CORPORATION and CROWLEY TOWING and TRANSPORTATION COMPANY,

Defendants.

FINAL JUDGMENT

This cause having been tried before a jury, and the jury having returned a verdict as follows:

"VERDICT"

WE, the Jury, return the following verdict.

1) Was there negligence on the part of the Defendants, CARIBE TUGBOAT CORPORATION and CROWLEY TOWING AND TRANSPORTATION COMPANY, which was a legal cause of damage to the Plaintiff, DANIEL T. DUFFY?

YES X NO _____

2) Did the Defendants, CARIBE TUGBOAT CORPORATION and CROWLEY TOWING AND TRANSPORTATION COMPANY, breach their duty to furnish a seaworthy vessel to the Plaintiff, and, if so, was the breach a legal cause of damage to the Plaintiff, DANIEL T. DUFFY?

YES X NO _____

If your answers to questions 1 and 2 are both NO, your verdict is for the Defendant, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to *either* question 1 or 2 is YES, please answer question 3.

3) Was there negligence on the part of the Plaintiff, DANIEL T. DUFFY, which was a legal cause of his injury?

YES _____ NO X

If your answer to question 3 is YES, please answer question 4. If your answer to question 3 is NO, skip question 4 and answer question 5.

4) State the percentage of any fault, which was a legal cause of damage to the Plaintiff, DANIEL T. DUFFY, that you have charged to:

Defendants, CARIBE TUGBOAT CORPORATION and CROWLEY TOWING AND TRANSPORTATION COMPANY _____%

Plaintiff, DANIEL T. DUFFY _____%

Total must be 100 %

Please answer question 5.

5) We find the total damages sustained by the Plaintiff, DANIEL T. DUFFY, to be *$400,000.00.*

In determining the total amount of damages, do not make any reduction because of the negligence, if any, of the Plaintiff, DANIEL T. DUFFY. If you have found the Plaintiff, DANIEL T. DUFFY, negligent in any degree, the Court, in entering judgment, will reduce the Plaintiff's total amount of damages (100%) by the percentage of negligence which you found chargeable to the Plaintiff.

SO SAY WE ALL this *26th* day of February, 1982:

/s/ BILLY J. HUNTER
Foreman or Forewoman

it is

ORDERED AND ADJUDGED that the Plaintiff, DANIEL T. DUFFY, recover the sum of $400,000.00 for which let execution issue. Costs will be taxed on Motion of the parties.

ORDERED in Chambers in Jacksonville, Duval County, Florida, this *1st* day of March, 1982.

/s/ GORDON A. DUNCAN, JR.
Circuit Judge

Copies Furnished To:

Robert L. Cowles, Esq.
Post Office Box 1860
Jacksonville, FL 32201

James F. Moseley, Esq.
1000 Barnett Bank Building
Jacksonville, FL 32202

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 80-5794-CA

DIVISION: "I"

DANIEL T. DUFFY,

Plaintiff,

vs.

CARIBE TUGBOAT CORPORATION and CROWLEY TOWING and TRANSPORTATION COMPANY,

Defendant.

MOTION FOR NEW TRIAL, JUDGMENT NOT WITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE FOR REMITTITUR

COME NOW the Defendants, CARIBE TUGBOAT CORPORATION and CROWLEY TOWING and TRANSPORTATION COMPANY, by and through their undersigned attorneys, and pursuant to the Florida Rules of Civil Procedure, herewith move the Court to set aside the Verdict and Final Judgment entered thereon on March 1, 1982 and enter Judgment not withstanding verdict or, in the alternative, for remittitur on the following grounds:

1. The verdict is contrary to the law.

2. The verdict is contrary to the evidence.

3. The verdict is contrary to the law and the evidence.

4. The verdict is contrary to the manifest weight of the evidence.

5. There is no evidence that the Defendants were guilty of negligence.

6. The evidence affirmatively shows that the sole proximate cause of Plaintiff's injury and damage was the negligence of Plaintiff DUFFY.

7. The evidence affirmatively shows that Plaintiff DUFFY was guilty of negligence which caused or contributed to causing Plaintiff's injury and damage.

8. There is no evidence that the Defendants, CARIBE TUGBOAT CORPORATION and CROWLEY TOWING and TRANSPORTATION COMPANY, were guilty of negligence which was a proximate cause of Plaintiff's injury and damage.

9. The Court erred in denying Defendant's Motion to Direct a Verdict in its favor at the close of Plaintiff's case.

10. The Court erred in denying Defendant's Motion to Direct a Verdict in its favor at the close of all the evidence.

11. There is no sufficient or substantial evidence pending to support the jury's verdict.

12. It affirmatively appears from the verdict that the jury disregarded their oath as jurors and arbitrarily and capriciously refused to render a verdict on the testimony and law given by the Court.

13. The Verdict is clearly excessive and not supported nor sustainable by the evidence.

14. The Court erred in giving Plaintiff's Requested Jury Instruction No. 17 as follows:

"In your consideration of the Plaintiff's claims of negligence and unseaworthiness, you are instructed that a seaman does not assume the risk inherent in carrying out the orders of his superior, nor is he contributorily negligent for carrying out those orders, for there is an obligation on the part of the seaman to obey orders given by his superiors."

15. The Court erred in refusing to give Defendants' Requested Jury Instruction No. 20 as follows:

"An injured party is under legal obligation to mitigate his damages, that is, to minimize the economic loss resulting from his injury, by resuming gainful employment as soon as such can reasonably be done. He may recover damages for lost earnings, and for the loss of the ability to earn money in the future, but is precluded from the recovery to the extent that he could have earned wages in the past and to the extent that he has the ability to earn money in the future."

16. The Court erred in refusing to give Defendants' Requested Jury Instruction No. 23 as follows:

"The Court instructs the Jury that in the event you should award compensatory damages to Mr. Duffy in this case, that any award will not be subject to the Federal Income Tax and that the Jury should not, therefore, add or subtract taxes in fixing the amount of any award."

* * *

* * *

19. In the alternative, Defendants would move the Court for a remittitur of the Verdict of FOUR HUNDRED THOUSAND AND NO/100 DOLLARS ($400,000.00) as damages to Plain-

tiff to an amount not exceeding TWO HUNDRED THOUSAND AND NO/100 DOLLARS ($200,000.00). As grounds for this request for remittitur, Defendants would respectfully show that the United States Supreme Court in *Norfolk and Western Railway Company v. Leipelt*, 444 U.S. 490, 62 L.Ed.2d 689, 100 Sup.Ct. 755 (1980) ruled that the State Trial Court erred in refusing to instruct the jury as to the non-taxability of any damage award. Obviously, since the jury was not instructed in this regard prior to reaching their verdict and assessment of damages in this case, they presumably felt that such an award would be subject to Federal Income Tax or other taxes. Therefore, since such an award is clearly within the 50% bracket, Defendants would request a remittitur of the damage amount as found by the jury to the sum of TWO HUNDRED THOUSAND AND NO/100 DOLLARS ($200,000.00).

Respectfully submitted,

TOOLE, TAYLOR, MOSELEY & JOYNER

By /s/ JAMES F. MOSELEY
JAMES F. MOSELEY
1000 Barnett Bank Building
Jacksonville, Florida 32202
904/356-1306

Attorneys for Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the following addressee by *hand*, this *5th* day of march, 1982:

ROBERT L. COWLES, ESQUIRE
1108 Blackstone Building
Jacksonville, Florida 32202

Attorneys for Plaintiff.

/s/ JAMES F. MOSELEY
ATTORNEY

IN THE CIRCUIT COURT, IN AND FOR
DUVAL COUNTY, FLORIDA.

CASE NO. 80-7594-CA

DIVISION: "I"

DANIEL T. DUFFY,

Plaintiff,

v.

CARIBE TUGBOAT CORPORATION and CROWLEY TOWING AND TRANSPORTATION COMPANY,

Defendants.

ORDER

THIS CAUSE come on to be heard upon Motions of Defendant, CARIBE TUGBOAT CORPORATION and CROWLEY TOWING and TRANSPORTATION COMPANY, for a new trial, judgment notwithstanding the verdict, or in the alternative for remittitur; and the Court having heard argument of counsel and being further advised in the premises, it is,

ORDERED AND ADJUDGED:

That said motion shall be and the same is hereby denied.

DONE AND ORDERED in Chambers, at Jacksonville, Duval County, Florida, this 12th day of April, 1982.

/s/ GORDON A. DUNCAN, JR.
CIRCUIT JUDGE

Copies:

Robert L. Cowles, Esquire
COWLES, COKER, MYERS, SCHICKEL
& PIERCE, P.A.
Post Office Box 1860
Jacksonville, Florida 32201

James F. Moseley, Esquire
TOOLE, TAYLOR, MOSELEY & JOYNER
1000 Barnett Bank Building
Jacksonville, Florida 32202

THE COURT: . . . (s)o I decided I wouldn't give 23.

MR. BUBB: All right. And now we are arguing on mine, I guess.

THE COURT: And then you handed me something. Here I've got three of yours here.

MR. BUBB: I'll take them all back except that one then, Judge. That will be easier.

THE COURT: There's two of them. I think I have three. Okay. These are opposites. This is net and that's gross.

MR. BUBB: That's been our problem.

MR. COWLES: Why don't we just leave it for jury argument?

THE COURT: Okay. We will just leave it for the jury.

MR. BUBB: If I can just make it plain on the record, Your Honor, I would object that — to the Court's refusal to charge that the damages are not subject to the income taxes as required by Liepelt.

THE COURT: Okay. Let's go on.

24.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE
REHEARING MOTION AND DISPOSITION THEREOF
IF FILED.

CASE NO. AL-489

CARIBE TUGBOAT CORPORATION, and CROWLEY
TOWING and TRANSPORTATION COMPANY,

Appellants,

vs.

DANIEL T. DUFFY,

Appellee.

Opinion filed February 14, 1938.

An appeal from the Circuit Court for Duval County
Gordaon A. Duncan, Jr., Judge.

James F. Moseley of Toole, Taylor, Moseley & Joyner,
Jacksonville, for Appellants.

Robert L. Cowles and Daniel C. Shaughnessy of Cowles,
Coker, Myers, Schickel & Pierce, Jacksonville, for Appellee.

PER CURIAM.

Appellant seeks rversal of a jury award based upon the trial court's failure to instruct the jury as to the non-taxability of the award pursuant to the judicially stated rule of *Norfolk and*

Western Railway Company v. Liepelt, 444 U.S. 490, 100 S.Ct. 7775, 62 L.Ed.2d 689 (1980). We concede that *Liepelt* requires the instruction on the non-taxability of the award be given, therefore it was error to fail to do so. However, considering the evidence presented and the relative amount of the award, we find it was harmless error under the circumstances of this case.

Accordingly, the trial court's final judgment is AFFIRMED.

SHIVERS, WENTWORTH AND JOANOS, JJ. CONCUR.

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32301
Telephone No. (904) 488-6152
Date: March 18, 1983
CASE NO. AL-489

CARIBE TUGBOAT CORPORATION, et al

Appellant/Petitioner

vs.

DANIEL T. DUFFY

Appellee/Respondent

ORDER

Motion for rehearing DENIED.

By Order of the Court
RAYMOND E. RHODES, CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

James F. Moseley, Esquire, Jacksonville, Florida
Daniel C. Shaughnessy, Esquire, Jacksonville, Florida
Robert L. Cowles, Esquire, Jacksonville, Florida

/s/ CATHERINE RANEU
DEPUTY CLERK

SUPREME COURT OF FLORIDA

TUESDAY, JULY 26, 1983

DISTRICT COURT OF APPEAL, 1st DISTRICT - NO. AL-489

CASE NO. 63,480

CROWLEY TOWING and TRANSPORTATION COMPANY and CARIBE TUGBOAT CORPORATION,

Petitioners,

vs.

DANIEL T. DUFFY,

Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ALDERMAN, C.J., ADKINS, OVERTON, McDONALD and EHRLICH, JJ., Concur BOYD and SHAW, JJ., Dissent

cc: Hon. Raymond E. Rhodes,
Clerk
Hon. S. Morgan Slaughter,
Clerk
Hon. Gordon A. Duncan, Jr.,
Judge

James F. Moseley, Esquire
of Toole, Taylor, Moseley
& Joyner
Daniel C. Shaughnessy, Esquire
of Cowles, Coker, Myers,
Schickel & Pierce

A True Copy
TEST:
Sid J. White
Clerk Supreme Court.

By: /s/ Dubbie Causseax
DEPUTY CLERK

TABLE OF CONTENTS

Page

A. STATEMENT OF THE CASE 2

B. STATEMENT OF THE CASE 3

ISSUES 9

POINT I. WHETHER THE COURT COMMITTED REVERSIBLE ERROR IN FAILING TO GIVE THE REQUESTED INSTRUCTION REGARDING INCOME TAX IN A JONES ACT CASE, 46 U.S.C. §688, A MATTER OF FEDERAL LAW 11

* * *

* * *

Supreme Court, U.S.
FILED
DEC 5 1983
ALEXANDER L. STEVAS
CLERK

No. 83-656

In the Supreme Court of the United States

October Term, 1983

CARIBE TUGBOAT CORPORATION AND CROWLEY TOWING AND TRANSPORTATION COMPANY,
Petitioners,

vs.

DANIEL T. DUFFY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

I. WHETHER A FEDERAL QUESTION IS PRESENTED IN THIS PETITION UPON WHICH THIS COURT MAY TAKE JURISDICTION AND, IF SO, WHETHER THE DECISION OF THE COURT BELOW RESTED UPON ADEQUATE AND INDEPENDENT STATE GROUNDS.

II. WHETHER THIS HONORABLE COURT MAY REVIEW, BY WRIT OF CERTIORARI, A DETERMINATION OF "HARMLESS ERROR" MADE BY A LOWER STATE COURT IN A JONES ACT AND GENERAL MARITIME CASE.

TABLE OF CONTENTS

QUESTIONS FOR REVIEW I
TABLE OF CONTENTS II
TABLE OF AUTHORITIES III
STATUTES INVOLVED 1
STATEMENT OF THE CASE 2
SUMMARY OF ARGUMENT 2
ARGUMENTS FOR DENYING WRIT 4

I. There is no federal issue raised which would support this Court's jurisdiction. The decision of the state court below rests solely on adequate and independent state grounds 4

II. Any issue raised is insubstantial as the decision of the state court is a decision of fact determined in accordance with the law established by the United States Supreme Court 10

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Bair v. St. Louis-San Francisco Ry. Co., 647 S.W.2d 507 (Mo. banc 1983) 11

Flanigan v. Burlington Northern, Inc., 632 F.2d 880 (C.A. 8th Cir. 1980), cert. denied, 450 U.S. 921, 101 S.Ct. 1370, 67 L.Ed.2d 349 (1981) 11, 12

Fox Film Corporation v. Muller, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935) 8

Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981) 12, 13

Herb v. Pitcairn, 324 U.S. 118, 65 S.Ct. 459, 89 L.Ed. 789 (1945) 8

Jankovich v. Indiana Toll Road Comm., 379 U.S. 487, 85 S.Ct. 493, 13 L.Ed.2d 439 (1965) 8

Marynik v. Burlington Northern, Inc., 317 N.W.2d 347 (Minn. 1982) 11

Norfolk and Western Ry. Co. v. Liepelt, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980) ..... 5, *passim*

Vanskike v. ACF Industries, Inc., 655 F.2d 188 (C.A. 8th Cir. 1981) 11

Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) 8, 9

Statutes

3 F.S.A. §59.041 ..... 1, 7

28 U.S.C. §2111 ..... 2, 14

No. 83-656

In the Supreme Court of the United States

October Term, 1983

CARIBE TUGBOAT CORPORATION AND CROWLEY TOWING AND TRANSPORTATION COMPANY,
Petitioners,

vs.

DANIEL T. DUFFY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTES INVOLVED

1. 3 F.S.A. §59.041 (1965).

HARMLESS ERROR; EFFECT

"No Judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to

which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed."

2. 28 U.S.C. §2111 (1949).

HARMLESS ERROR

"On the hearing of any appeal or writ of certiorari in any case, the court shall give Judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

STATEMENT OF THE CASE

Respondent adopts the Statement of the Case contained in Petitioners' brief at pages 4 and 5 except, of course, with respect to that language which indicates that a "substantial federal question" is presented to the court.

In addition, Respondent adopts from Petitioners' brief, the List of Parties (p. ii), Petitioners' Appendix (pp. A1-A18) and Petitioners' Reference to Official Reporter (p. 1).,

SUMMARY OF ARGUMENT

Respondent contends that no federal question is presented to this Court for its determination. Any federal question at issue in this case was decided in Petitioners' favor by the Florida First District Court of Appeal.

Even if a federal question were framed by this Petition, this Court, as a matter of jurisdiction, should not reach that federal question inasmuch as the holding of the court below rests upon adequate and independent state grounds routinely and uniformly applied to cases within the State of Florida.

No assault upon the uniformity of maritime law is presented by the holding of the Florida First District Court of Appeal. In fact, in applying the harmless error rule to its consideration of this case, the lower appellate court has properly applied its own precedents and the time-honored precedents of the common law. In addition, it has applied the same authority which has previously been recognized by this Court in its holdings on this very issue.

It is Respondent's contention that Petitioners are actually seeking a new rule of law, never before present in the common law, federal or state, or in the maritime law. Petitioners seek a rule whereby error in this particular respect will be reversible in each and every case regardless of the facts and circumstances involved.

Petitioners seek to have this Court substitute its judgment on factual grounds for the judgment of the appellate court below. In doing so, this court would be constrained to follow exactly in the footsteps of the Florida First District Court of Appeal in its holding on the federal question presented and, further, would then be constrained to follow the lower appellate court in examining the record for prejudice and in determining whether the error complained of was harmless. This is not, and has never been, the jurisdiction or proper function of this Honorable Court.

ARGUMENT

I

There Is No Federal Issue Raised Which Would Support This Court's Jurisdiction. The Decision of the State Court Below Rests Solely on Adequate and Independent State Grounds.

In their Petition for Writ of Certiorari to this Honorable Court, Petitioners have styled their request as a Petition For Issuance of Certiorari to the Supreme Court of the State of Florida.

Respondent would note, as is reflected in Petitioners' filing, that the Supreme Court of Florida has denied a similar Petition for Writ of Certiorari taken by Petitioners from the decision of the Florida First District Court of Appeal. The Florida Supreme Court has declined jurisdiction in this case either on discretionary or state constitutional grounds. Therefore, the Florida First District Court of Appeal in this cause is the highest state court from which a decision could be, or was, rendered. Respondent notes that the proper application to this Court is for a writ of certiorari to be issued to the Florida First District Court of Appeal and not to the Florida Supreme Court.

Respondent does not assert that this error on the face of the Petition should be dispositive of the issues in this case but would suggest that Petitioners have misconceived the court to which any Writ of Ceritorari issued by the Supreme Court should be directed.

Petitioners assert that a substantial federal question is presented to this Court because of the failure of the

trial court, as requested, to give an instruction on the non-taxability of any award as mandated by this Court in its decision in *Norfolk and Western Ry. Co. v. Liepelt,* 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980). Petitioners also contend that the failure to give this instruction raises a substantial federal question because the cohesiveness and uniformity of federal maritime law is threatened by the trial court's error in failing to give this instruction.

Respondent concedes that this instruction, as mandated by *Liepelt, supra,* was requested by Petitioners in the trial court, but it was harmless error for the trial court to refuse to give the instruction. Respondent submits, for the following reasons, that a federal question is not now presented to this Court on appeal and that any question, federal or otherwise, is not substantial.

Respondent contends that this Court has no jurisdiction to entertain this case and should exercise its discretion by refusing to take jurisdiction of a non-substantial issue.

Respondent also notes that the non-taxability instruction represents the only issue in the instant case which was also discussed in *Liepelt, supra.* Inamuch as Petitioners were granted the right to cross-examine Respondent's witnesses at trial and to present their own evidence on the issues of inflation and taxes as they applied to computations of future earnings and investments, the other issues decided in *Liepelt* are not present in the instant case, nor have they been advanced here by Petitioners.

On appeal from the trial court to the Florida First District Court of Appeal (see Petitioners' Appendix at pages A13 and A14), the court specifically grounded its

decision on the identical issue here advanced by Petitioners.

The finding of the Florida First District Court of Appeal recognized *Liepelt, supra,* but decided that the failure to give the *Liepelt* instruction was nothing more than harmless error, after reviewing the entire trial transcript.

Thus, on the legal issue presented to it, the Florida court considered *Liepelt, supra,* and decided in Petitioners' favor. As it was required to do, the appellate court then made a finding of fact, or a mixed finding of fact and law, in determining whether the error constituted substantial prejudice to the Petitioners or was harmless.

Clearly, the appellate court below had sufficient evidence of record upon which to base its findings of fact. By reviewing the record and the transcript of the proceedings below, the appellate court had knowledge of the extensive injuries and losses suffered by Daniel Duffy and of the certain future losses, supported by medical testimony, which he would sustain as a result of his injuries, including evidence of required future surgeries, the substantial permanent disability suffered by Mr. Duffy, severe pain and suffering both past and future and a substantial diminution of earning capacity. It was clear to the court below that the evidence of damages sustained by him substantially exceeded the amount of the jury award and that this evidence was largely unrebutted at the trial level. The appellate court had no issue of liability before it. As here, Petitioners appeared before that court as admitted tortfeasors, solely responsible for the injuries and damages sustained by Daniel Duffy, a seaman in their employ.

In weighing the effect of the error in failing to give the subject instruction, the appellate court below acted within the dictates and strictures of Florida statutory law found at 3 F.S.A. §59.041 (1965). That statute, which has been the law of Florida in substantially the same form since 1911 (see Laws 1911, c.6223, §1), specifically required the appellate court, upon finding of error in the "misdirection of the jury," to assess that error with respect to its effect on the rights of the parties and any resulting prejudice thereto.

To the extent that the application of this Florida state statute is a traditional and long-standing rule of procedure, universally applied throughout the state for many years, its application to the trial of a federal cause of action is entirely proper and binding. Petitioners suggest that its application in this case is somehow a devious attempt to undermine Petitioners' federal rights and to avoid or subvert a federal cause of action in the state courts of Florida. Petitioners' position in this regard cannot be factually supported. Whether as a matter of statutory or common law authority, this Court and every court in this nation is familiar with and daily applies, the concept of harmless error. There are few rules in the common law which are more universally recognized and applied.

In view of the decision of the Florida First District Court of Appeal, it is apparent that the first issue facing this Honorable Court in determining whether it has jurisdiction in this matter is the issue of whether a federal question is presented in any form before this court or whether the decision below rests upon adequate and independent state grounds. Here no federal question is presented by the application of the federal common law stated in *Liepelt*. With respect to the alleged erroneous

failure to give the requested instruction, no federal question is presented to this Court by the ruling of the Florida First District Court of Appeal. That court identified a problem and recognized *Liepelt, supra,* but decided that the failure to give the instruction was harmless error. Therefore, any federal question which is now presented to this Court from the decision of the Florida First District Court of Appeal must be a question raised by that court's application of the harmless error doctrine to this particular case.

In applying the harmless error doctrine, the lower appellate court was applying a state rule of procedure and the only issue presented is whether the application of the harmless error doctrine was an independent and adequate state ground on which this decision rests.

It has long been recognized by this Court, in a variety of circumstances involving federal and constitutional questions, that if a state decision, even one involving federal questions, is properly grounded upon adequate and independent state grounds, then the decision cannot be upset, nor jurisdiction taken by this Court. *Fox Film Corporation v. Muller,* 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935); *Herb v. Pitcairn,* 324 U.S. 118, 65 S.Ct. 459, 89 L.Ed. 789 (1945); *Jankovich v. Indiana Toll Road Comm.,* 379 U.S. 487, 85 S.Ct. 493, 13 L.Ed.2d 439 (1965); *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

This well-settled rule, is clearly one which applies even to federal causes of action, including causes of action under the Federal Employers' Liability Act, *Herb, supra.* It is equally clear that, when the decision of the Court below rests upon an adequate and independent state ground, federal courts have no jurisdiction to further

review the case and the action is appropriate for denial of certiorari or dismissal of certiorari improvidently granted.

This principle alone, as clearly and simply stated throughout the years by this Court, should provide the grounds for immediate denial of this Petition. Beyond doubt, any federal question before the lower appellate court was resolved by the court in accordance with the dictates of this Court in its decision in *Liepelt, supra.* It is equally clear that the remaining determination made by the lower appellate court constitutes an independent state ground adequate to support the decision. Whether the application of Florida's harmless error statute is considered to be substantive or procedural is not germane to this Court's disposition of this case. Even where the rights of individuals under the United States Constitution are being considered, it has clearly been held that, whether the grounds of the state action are substantive or procedural, if they are independent of the federal cause of action and adequate to support the state decision, then jurisdiction will not lie. *Wainwright, supra.*

Despite Petitioners' inferential suggestion that the Florida appellate court is in some way undermining the administration of maritime law, a federal cause of action, there is no concrete indication that this is the case. Florida has properly applied a state statute on harmless error which has been applied in that state's appellate courts for many decades, both on statutory grounds and as a well-recognized and universally applied rule of common law. The rule is as much one of a common sense as of common law.

Unlike the situation which faced this court in *Liepelt, supra*, there was no clear evidence of an excessive verdict

for Daniel Duffy. The court in *Liepelt, supra,* went to some length to demonstrate the excessiveness of the verdict in that case from the evidence before it. In fact, the principles which the Court was applying in assessing the excessiveness of the verdict in *Liepelt, supra,* were precisely the same principles, although based on different facts, which were applied by the lower Florida court in the instant case. The only difference is that the lower court in this case, on the facts and evidence of record, found no prejudice to Petitioners by the error which it noted. The verdict was supported by the evidence. In *Liepelt, supra,* that same review of the facts and evidence of record led to a clear, factual conclusion that Petitioners had been prejudiced by the failure to give the requested instruction and by other errors in the trial.

Unlike this Court's deliberations in *Liepelt, supra,* Petitioners here seek to avoid an orderly review of the record with regard to harmless error as was done in the Florida appellate court and to have this court declare that any failure, upon request, to instruct as to the nontaxability of an award is ipso facto reversible error in every instance. This point is further addressed below.

II

Any Issue Raised Is Insubstantial As the Decision of the State Court Is a Decision of Fact Determined in Accordance With the Law Established by the United States Supreme Court.

Petitioners assert throughout their brief that the decision of the First District Court of Appeal in Florida poses a threat of some type to the orderly and uniform application of the general maritime law in this county. However, when this claim is analyzed, it is clear that

the federal law in this case, as set forth in *Liepelt, supra,* has been recognized and applied by the lower appellate court. What Petitioners seem to be requesting is a factual review of the record by the Supreme Court and a redetermination, based upon the facts and evidence of record, as to whether Petitioners have been prejudiced by the application of the harmless error rule. Such a review, on factual issues alone, is not, nor has it ever been, the proper appellate function of the United States Supreme Court.

What Petitioners are actually asking of this Court is a summary declaration that the time-honored principle of prejudice or harmlessness of error can *never* be applied in a Jones Act or general maritime case. Such a proposition is erroneous, as indicated in the cases below.

Since the decision in *Liepelt, supra,* both federal and state courts have applied the harmless error rule to the same issue presently before this Court in this Petition. *Marynik v. Burlington Northern, Inc.,* 317 N.W.2d 347 (Minn. 1982); *Bair v. St. Louis-San Francisco Ry. Co.,* 647 S.W.2d 507 (Mo. banc 1983); *Vanskike v. ACF Industries, Inc.,* 655 F.2d 188 (C.A. 8th Cir. 1981); *Flanigan v. Burlington Northern, Inc.,* 632 F.2d 880 (C.A. 8th Cir. 1980), cert. denied, 450 U.S. 921, 101 S.Ct. 1370, 67 L.Ed. 2d 349 (1981).

In *Flanigan, supra,* the Eighth Circuit Court of Appeals was faced with precisely the same issue which was before the Florida First District Court of Appeal. That court first determined that giving the *Liepelt* instruction was a requirement to be retroactively applied. That being the case, the court had to determine whether the failure to give that instruction, which was error, was prejudicial to the Defendant or merely harmless error. Upon review

of the authorities and of this Court's decision in *Liepelt, supra*, the Eighth Circuit determined that, upon the facts and evidence in the record before it, the failure to give the *Liepelt* instruction was harmless. The judgment was affirmed.

Thereafter, as the citation above indicates, this Court denied a Petition for Certiorari on this very issue arising out of the decision of the court in *Flanigan, supra.*

From the above it appears that the cohesive and uniform application of maritime law and Jones Act causes of action requires that any error, including failure to give the *Liepelt* instruction, be tested for prejudice before such error automatically mandates a reversal. For this Court to now find that the failure to give the *Liepelt* instruction is, in every case, regardless of the facts and circumstances, reversible error, as Petitioners urge, would not serve to insure uniformity in maritime cases but would, in fact, overrule hundreds of years of uniform application of well-known and well-settled rules of common law to such causes of action. Not uniformity, but confusion, would be the result.

Lest there be any doubt that the harmless error principle is applicable, in federal causes of action, to the required *Liepelt* instruction, this Court has provided even clearer guidance than that provided by its denial of the Petition for Certiorari in *Flanigan, supra.* In *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981), this Court considered the applicability of the required *Liepelt* instruction to a federal cause of action under the Outer Continental Shelf Lands Act (OCSLA). Faced with a discrepancy between the applicability of state law and federal common law, as represented by the *Liepelt* ruling, this Court remanded

the cause of action to the Texas Court of Civil Appeals for a determination resolving whether state or federal law applied. The Court went on to state that, if the federal common law rule applied and the *Liepelt* instruction was required, then the Texas court should continue its consideration of the case to determine whether the error in refusing to give the *Liepelt* instruction was prejudicial to the petitioner:

> "If the Court decides that it was error to refuse the the instruction, it may then address respondent's argument that petitioner was not prejudiced by the error." *Gulf Offshore, supra,* at 101 S.Ct. 2880.

Clearly then, it has been this Court's intention with respect to the *Liepelt* instruction, that the mandate shall apply, as federal common law, to all federal causes of action. It is equally clear that, once it is established that error has been committed by failure to give the instruction, it is this Court's stated practice that a further determination be made as to any prejudicial effect of the error and that reversal be mandated only where clear prejudice has been shown.

Given the weight and history of this basic common law principle, its application to all causes of action, both state and federal, and the simple logic which it embodies, there can be no serious assertion that the application of the harmless error rule poses a threat to the uniformity and cohesiveness of the maritime law. The contrary is true. Petitioners do not here assert any excessiveness of the verdict or prejudice to them by virtue of the error in failing to give the *Liepelt* instruction, nor can Petitioners do so. That issue was properly raised and disposed of by the Florida First District Court of Appeals and its determination was based upon its review of the entire record and transcript before it.

In effect, what Petitioners here request is a ruling from this Court that, regardless of the circumstances and evidence in a given case, a failure to give the *Liepelt* instruction will constitute reversible error in each and every case, without further examination. Such a rule furthers neither the orderly administration of justice nor the uniformity and cohesiveness of the application of maritime law so highly prized by Petitioners. The institution of such a rule would represent a marked departure from the past uniform application of federal and state maritime law.

This Court needs also to consider the statutory provisions under which review of this case would be granted and consideration of the case on its merits would be carried out. Clearly, the provisions of 28 United States Code §2111 apply the same principles of review for prejudice as are embodied in the Florida statute cited above. It is clear from the reading of that statute that, absent a clear showing of prejudice, there is no issue for this Court's review and that the stricture contained in that statutory provision specifically applies to this Court's consideration of Petitions for Certiorari.

CONCLUSION

Respondent submits that the proper procedure is instead to follow the Florida Supreme Court, finding that there is no justiciable issue which would justify the taking of jurisdiction or the grant of certiorari in a case involving only factual issues resolved by the court below with the record and transcript of trial before it.

For all the reasons stated above, Respondent respectfully requests this Court to deny the instant Petition for Writ of Certiorari.

COWLES, COKER MYERS, SCHICKEL
& PIERCE, P.A.
By ROBERT L. COWLES
JAMES R. BARFIELD
DANIEL C. SHAUGNESSY
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Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Mr. James F. Moseley, Toole, Taylor, Moseley & Joyner, 501 West Bay Street, Jacksonville, Florida 32202, Mr. William R. P. Hogan and Mr. John J. Walsh of the Law firm of Freehill, Hogan & Mahar, 80 Pine Street, New York, N.Y. 10005, by United States Mail this 1st day of December, 1983.

ROBERT L. COWLES
COWLES, COKER, MYERS, SCHICKEL
& PIERCE, P.A.
Post Office Box 1860
Jacksonville, Florida 32202
Attorneys for Respondent
Daniel T. Duffy

Office-Supreme Court, U.S.
FILED
DEC 23 1983
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

No. 83-656

CARIBE TUGBOAT CORPORATION
AND CROWLEY TOWING
and TRANSPORTATION COMPANY,

Petitioners,

vs.

DANIEL T. DUFFY,

Respondent.

Reply of Petitioners in Support of Petition for Writ of Certiorari

William R. P. Hogan
John J. Walsh
Freehill, Hogan & Mahar
New York, New York

and

James F. Moseley
Toole, Taylor, Moseley
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501 West Bay Street
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(904) 356-1306
Attorneys for Petitioners

QUESTION FOR REVIEW

Whether a state forum in adjudicating a maritime and Jones Act claim must adhere to explicit law established by the Supreme Court of the United States.

LIST OF THE PARTIES

The parties, with reference to their status at the Trial Court are:

1. Petitioners - Caribe Tugboat Corporation and Crowley Towing and Transportation Company, Defendants.

   Crowley Maritime Corporation is the parent corporation of Petitioners.

2. Respondent - Daniel T. Duffy, Plaintiff.

TABLE OF CONTENTS

Page

QUESTION FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

ARGUMENT 1

CONCLUSION 5

CERTIFICATE 6

TABLE OF AUTHORITIES
CASES

Page

Bihn v. United States,
328 U.S. 633 (1946) 3

Bonner v. City of Prichard, Alabama,
661 F.2d 1206 (11th Cir. 1981) 2

Erie Ry. v. Tompkins,
304 U.S. 64 (1938) 1

Ferguson v. Moore-McCormack Lines, Inc.
352 U.S. 521 (1957) 2

Fillippon v. Albion Vein Slate Co.,
250 U.S. 76 (1919) 3

Fox Film Corp. v. Muller,
296 U.S. 207 (1935) 1

Garret v. Moore-McCormack Co.,
317 U.S. 239 (1942) 2

Gulf Offshore Co. v. Mobil Oil Corp.,
453 U.S. 473 (1981) 1

Herb v. Pitcairn,
324 U.S. 117 (1945) 1

Jankovich v. Indiana Toll Road Commission,
379 U.S. 487 (1965) 1

Kingston Shipping Co. v. Roberts,
667 F.2d 34 (11th Cir. 1982) 2

Lang v. Texas & Pacific Ry.,
624 F.2d 1275 (5th Cir. 1980) 2

Maynard v. Durham & Southern R.R.,
365 U.S. 160 (1961) 2

McCandless v. United States,
298 U.S. 342 (1936) 3

Messel v. Foundation Co.,
274 U.S. 427 (1927) 2

New Orleans & N.E.R.R. v. Harris,
247 U.S. 367 (1918) 2

Norfolk & Western R.R. v. Liepelt,
444 U.S. 490 (1980) 1, 2

O'Byrne v. St. Louis Southwestern Ry.,
632 F.2d 1285 (5th Cir., Unit A, 1980) 2

United States v. River Rouge Improvement Co.,
269 U.S. 411 (1926) 3

Virginian Ry. v. Mullens,
271 U.S. 220 (1926) 1

Wainwright v. Sykes,
433 U.S. 72 (1977) 1

CONSTITUTIONAL PROVISIONS AND STATUTES

Page

1. The Jones Act, 46 U.S.C. §688 2

2. Federal Employees' Liability Act, 45 U.S.C. §§51 et seq. 2

3. 28 U.S.C.A. §2111 (1982) 2

4. The River and Harbor Act of July 18, 1918, 40 Stat. 904 4

ARGUMENT
I

CERTIORARI[1] IS NECESSARY TO CORRECT THE FLORIDA COURT'S ERRONEOUS APPLICATION OF THE FLORIDA HARMLESS ERROR STATUTE

Respondent asserts that the First District Court of Appeal's decision is not reviewable, because the Florida Harmless Error Statute determined that the failure to charge *Liepelt*[2] was not prejudicial to Petitioner[3]. Respondent reasons that this constitutes a "separate and independent state ground" for the decision. However, in each of the cases cited by Respondent[4], the federal and state issues were co-existent: the state court could have chosen either ground to decide the case. Here, the federal and state laws are mutually exclusive: the state court did not have the luxury of choosing which to apply; either state harmless error law applies or federal harmless error law applies. Deciding whether state or federal law applies to a particular issue has never been an impediment to this Court's jurisdiction *Cf. Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

It is, therefore, necessary for this Court to take another step to implement *Liepelt*. Having directed the Texas Court of Civil Appeals in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 488 (1981) to determine whether the failure to apply *Liepelt* is

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[1] Respondent is correct that the Writ of Certiorari should run to the Florida First District Court of Appeal. *Virginian Ry. v. Mullens*, 271 U.S. 220, 222 (1926). Petitioner apologizes for this inadvertant error. Respondent has agreed that this error is not dispositive of this Court's jurisdiction (Respondent's Brief at 4). Therefore, Petitioner presumes Respondent agrees to amend the Petition to Provide for the Writ of Certiorari to run to the Florida First District Court of Appeal.

[2] *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490 (1980).

[3] The Florida First District Court of Appeal's decision does not make it clear whether that Court decided this issue on state or federal grounds. *See* Petitioner's Brief for Writ of Certiorari, A-13, 14.

[4] *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Jankovich v. Indiana Toll Road Comm.*, 379 U.S. 487 (1965); *Herb v. Pitcairn*, 324 U.S. 117 (1945); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935).

"harmless error," it is respectfully submitted that this Court must now direct the Florida State Courts to apply the federal harmless error law to *Liepelt*. It is imperative that this Court take this step now, as the United States Court of Appeals in which Florida is located, has in each case so far decided, found failure to charge *Liepelt* to be prejudicial [5].

It is clear that the federal harmless error standard must apply [6]. *McCandless v. United States*, 298 U.S. 342 (1936). The actual wording of the Federal Harmless Error Statute defines "harmless error" as those "errors or defects which do not affect *the substantial rights of the parties*," 28 U.S.C.A. §2111 (1982) (emphasis added), thus leaving no doubt that determination of harmlessness is one of substance requiring application of federal law to a federal case, regardless of forum. *See Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942).

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[5] *O'Byrne v. St. Louis Southwestern Ry.*, 632 F.2d 1285 (5th Cir., Unit A, 1980); *Lang v. Texas & Pacific Ry.*, 624 F.2d 1275 (5th Cir. 1980). The former Fifth Circuit was divided into two units some time prior to its present division. The first decision of the United States Court of Appeals for the Eleventh Circuit was to adopt as governing law the Fifth Circuit body of precedent. *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir. 1981); *see also Kingston Shipping Co v. Roberts*, 667 F.2d 34 (11th Cir. 1982).

[6] A litany of this Court's cases supports application of the federal harmless error rule. For example, federal law controls as to the measure of damages, *Messel v. Foundation Co.*, 274 U.S. 427 (1927); as to the standard of care in Jones Act cases, *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521 (1957); as to the validity of releases under the Federal Employees' Liability Act, *Maynard v. Durham & Southern R.R.*, 365 U.S. 160 (1961); as to the burden of proof, *New Orleans & N.E.R.R. v. Harris*, 247 U.S. 367 (1918); and as to the sufficiency of evidence, *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942).

II.

THE TRIAL COURT'S ERROR WAS PREJUDICIAL

This Court has set forth the federal test for harmless error:

> And of course in jury trials erroneous rulings are *presumptively injurious*, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it *affirmatively appears* that they were harmless.

Fillippon v. Albion Vein Slate Co., 250 U.S. 76, 82 (1919) (emphasis added). *See also Bihn v. United States*, 328 U.S. 633 (1946); *McCandless v. United States*, 298 U.S. 342 (1936).

This case bears a striking similarity to *United States v. River Rouge Improvement Co.*, 269 U.S. 411 (1926), a partial condemnation proceeding, wherein the trial judge erred in instructing the jury on the amount of benefit that should be deducted from the riparian owners' award, after a partial condemnation[7]. The trial judge overemphasized the contingent character of the rights of the riparian owners, instructing the jury that those property rights were conditioned on Government largesse.

The Circuit Court in *River Rouge* believed this error to be harmless. However, this Court reversed, reasoning that the failure to observe the distinction between owners' riparian rights, which are subject to Government regulation, as opposed to rights which emanated from the Government,

[7] In order to transfer a narrow, binding, comparatively shallow Rouge River, which had previously been incapable of accomodating large freighters, into a long slip serving numerous docks and industries and accomodating the largest freighters on the Great Lakes, the United States Government partially condemned certain riparian lands to widen and thereby straighten the Rouge River. *Id.* at 414-15. As the riparian owners whose land was only partially condemned arguably had the value of their remaining lands enhanced by the partial condemnation, the United States sought to reduce their damages to the extent of that enhancement or "benefit" pursuant to the River and Harbor Act of July 18, 1918, 40 Stat. 904.

created the impression that the riparian rights were more contingent than they really were. This led the jury to devalue the land excessively, lower the estimate of the benefits resulting from the partial condemnation, and award excessive damages.

In *River Rouge*, the trial judge misled the jury as to the effect of the Government's "taking" which caused the jury to overcompensate the riparian owners. Here, the trial judge misled the jury as to the Government's inability to "take" taxes from Mr. Duffy's award, causing the jury to overcompensate him.

Moreover, the presumption of prejudice cannot be rebutted in this case as there is a preponderant probability the jury did consider the effect of income taxes on the award. The Plaintiff was awarded $400,000 for a broken ankle, even though he was earning a higher income, after the accident, than he had earned before the accident. He lost only $21,000 in wages. All of his medical expenses, to date, have been paid.

The thrust of plaintiff's jury argument was the possible future medical expenses, which might be incurred by Plaintiff for ankle surgery. The consensus of the testifying physicians was that a surgical procedure would not be necessary for another five to ten years. Certainly, such surgery would not cost $400,000. Further, in five to ten years, the $400,000 would be worth substantially more.

Looking at the record in this case, it is likely that the jury wanted the plaintiff to obtain $200,000 and thus awarded $400,000 with the thought that the award would be taxed at a 50% rate. It therefore does not affrimatively appear that the error was harmless. *McCandless v. United States, supra; Fillipon v. Albion Vein Slate Co., supra.*

CONCLUSION

It is respectfully submitted that this Court should remand this case to the First District Court of Appeal, Florida for instructions to the trial court to retry the damages in this case or to effect a remittitur.

WILLIAM R. P. HOGAN
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& MAHAR

and

TOOLE, TAYLOR,
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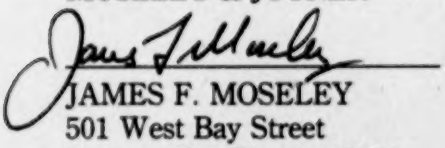

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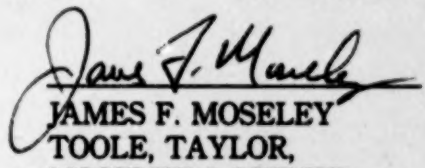
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Mr. Robert L. Cowles, Cowles, Coker, Myers, Schickel & Pierce, P.A., at Post Office Box 1860, Jacksonville, Florida 32201 by United States Mail this 22nd day of December, 1983.



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